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EXAMINER

CARTER, KENDRA D

ART UNIT

PAPER NUMBER

1617

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**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

## Office Action Summary

Application No.

10/626,069

Applicant(s)

CAWTHON, GARRET D.

Examiner

Kendra D. Carter

Art Unit

1617

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 02 November 2007.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 39-53, 57, 60, 74-76 and 87-94 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 39-53, 57, 60, 74-76 and 87-94 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- ☐ Notice of References Cited (PTO-892)
- ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- ☐ Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_
- ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_
- ☐ Notice of Informal Patent Application
- ☐ Other: \_\_\_\_\_

## DETAILED ACTION

### ***Continued Examination Under 37 CFR 1.114***

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on November 2, 2007 has been entered.

The Examiner acknowledges the applicant's remarks and arguments of November 2, 2007 made to the office action filed October 17, 2007. Claims 39-53, 57, 60, 74-76 and 87-94 are pending. Claim 39 is amended.

The Applicant's arguments of the 35 U.S.C. 102(b) rejection of claims 39, 49, 57, 74, 76 and 88 as being unpatentable over Heilig were found persuasive, and thus withdrawn.

For the reasons in the previous office action and below, the Applicant's arguments of the 35 U.S.C. 103(a) of claims 40-50, 52, 53, and 60 as being unpatentable over Heilig (US 3,079,299) as applied to claims 39, 49, 57, 74, 76, and 88 above, in view

of Paul et al. (US 6,217,890 B1), and in further view of Clark et al. (US 6,103,245) were found not persuasive, thus the rejection is upheld.

For the reasons in the previous office action and below, the Applicant's arguments of the 35 U.S.C. 103(a) of claims 51 and 52 as being unpatentable over Heilig (US 3,079,299) as applied to claims 39, 49, 57, 74, 76, and 88 above, in view of Steuart et al. (US 5,330,756) were found not persuasive, thus the rejection is upheld.

For the reasons in the previous office action and below, the Applicant's arguments of the 35 U.S.C. 103(a) of claims 74, 75, 87, 89, 93 and 94 as being unpatentable over Heilig (US 3,079,299) as applied to claims 39, 49, 57, 74, 76, and 88 above, in view of Ando (US 5,881,925) were found not persuasive, thus the rejection is upheld.

For the reasons in the previous office action and below, the Applicant's arguments of the 35 U.S.C. 103(a) of claims 90 and 91 as being unpatentable over Heilig (US 3,079,299) as applied to claims 39, 49, 57, 74, 76, and 88 above, in view of Davies et al. (US 5,169,037) were found not persuasive, thus the rejection is upheld.

For the reasons in the previous office action and below, the Applicant's arguments of the 35 U.S.C. 103(a) of claims 90 and 92 as being unpatentable over Heilig (US 3,079,299) as applied to claims 39, 49, 57, 74, 76, and 88 above, in view of Hanson et al. (US 5,249,747) were found not persuasive, thus the rejection is upheld.

Due to the amendment to the claims and the withdrawal of the 35 USC 102(b) rejection, the new and modified 35 U.S.C. 103(a) rejections are made below.

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

**(1) Claims 39, 49, 57, 74, 76 and 88 rejected under 35 U.S.C. 103(a) as being unpatentable over Heilig (US 3,079,299).**

Heilig teaches a self-propelling medicinal ointment composition and method of application comprising mineral oil, a polyethylene resin (i.e. solid particulate material) and a volatile propellant for dispensing and applying to the part of the body to be treated (see title and column 1, lines 11-16; addresses claim 39). The preferred mineral oil is petrolatum (see column 8, lines 43 and 44; addresses claim 49). The composition is adapted to be atomized from a fluid-tight container (see column 1, lines 30-34), in which the volatile propellant is a liquefied compressed gas provided in sufficient proportion in the ointment composition to atomize it through the valve of the container in which it is stored under pressure to produce a uniform porous coating of the polyethylene ointment

base with medicament dispersed therein (see column 2, lines 41-47; addresses claims 39, 74 and 88). Upon atomization onto the affected area of the body, the polyethylene resin provides a breathing film which permits access of air and oxygen to the affected area of the body and facilitates the rapid release of the medicament to the affected area (i.e. moisture barrier over the skin treatment area; see column 2, lines 7-11; addresses claim 39). The primary medicament includes an antiseptic, bactericidal, or antibiotic (see column 2, lines 56-58; addresses claim 57) in an aqueous or alcoholic solution with an emulsifying agent (see column 8, lines 5-9; addresses claims 39 and 57). In 20 cases of dermatitis, including diaper rash, the spray provided rapid relief (see column 5, lines 42-45; addresses claim 39). In regards to claim 76, the volatile compound evaporating after passage through the atomizing spray dispenser an inherent property of a "volatile" compound released under pressure.

Heilig does not specifically teach that the dispenser is not an aerosol device.

To one of ordinary skill in the art at the time of the invention would have found it obvious to combine the method of Heilig and other atomizer devices that are not aerosol because the Heilig teaches that the primary objective of the invention is to provide a self-propelling fluid medicinal ointment composition adapted to be atomized from a fluid-tight container and which when applied directly as a fine spray or mist to the body to be treated provides a breathing covering of polyethylene filament from which the medicament is rapidly released to the treated area of the body (see column 1, lines 30-

37). Although, the invention of Heilig focuses on the atomizing device being an aerosol, one skilled in the art is aware of other atomizing devices that provide the same effect of providing a fine spray or mist. Thus, the purpose of atomizing a diaper rash composition is taught by Heilig. Selection of a known material based on its suitability for its intended use is obvious absent a clear showing of unexpected results attributable to the Applicant's specific selection. See e.g., *In re Leshin*, 227 F.2d 197, 125 USPQ 416 (CCPA 1960). Since there was no unexpected results presented that differ the atomizing device of an aerosol versus other atomizing devices, one skilled in the art would have found it obvious to use other already established atomized devices to provide the same effect of providing a fine spray or mist.

**(2) Claims 40-53, and 60 rejected under 35 U.S.C. 103(a) as being unpatentable over Heilig (US 3,079,299) as applied to claims 39, 49, 57, 74, 76, and 88 above, in view of Paul et al. (US 6,217,890 B1), and in further view of Clark et al. (US 6,103,245).**

Heilig teachings are as applied to claims 39, 49, 57, 74, 76, and 88 above.

Heilig does not teach zinc oxide as the particulate or its average particle size (claims 40-43 and 60). Silicone oil, particularly cyclomethicone or dimethicone and derivatives thereof is not taught (claim 45). Talc, paraffin wax, microcrystalline wax,

calamine, kaolin, cod liver oil, plant based oil, or bees wax is also not taught (claims 46-48 and 50-53).

Paul et al. teaches an absorbent article for absorbing body fluids and exudates, such as disposable diapers and adult incontinence garments (see column 1, lines 19-23), which includes a lotion formulation or treatment composition which provides a skin health benefit, and/or have a reduced viability of microorganisms (see column 2, lines 56-58). The lotion formulation includes an emollient, a wax, optionally a viscosity enhancer, and other ingredients (see column 13, lines 57-59 and 64). The emollients act as lubricants to reduce the abrasiveness of the topsheet to the skin and, upon transfer to the skin, help to maintain the soft, smooth and pliable appearance of the skin (see column 13, lines 66, 67 to column 14, lines 1 and 2). Suitable emollients include vegetable based oils, mineral oils, natural or synthetic oils, silicone oils, lanolin and lanolin derivatives, kaolin and kaolin derivatives and the like and mixture thereof (see column 14, lines 3-5; address claims 39, 44, 48, 49, 57). The wax in the lotion formulations primarily functions as an immobilizing agent for the emollient and any active ingredient. In addition to immobilizing the emollient and reducing its tendency to migrate, the wax in the lotion formulation provides a tackiness, which improves the transfer to the skin of the wearer. The presence of the wax also modifies the mode of transfer in that the lotion tends to fracture or flake off instead of actually rubbing off onto the skin of the wearer which can lead to improved transfer to the skin. The wax may further function as an emollient, occlusive agent, moisturizer, barrier enhancer and



combinations thereof (see column 14, lines 31-43). Suitable waxes include beeswax, C30 alkyl dimethicone, jojoba oil, microcrystalline wax, paraffin and mixtures thereof (see column 14, lines 44, 47, 49, 52-54, and 59; addresses claims 45, 46, 52, 53 and 57). A viscosity enhancer increases the viscosity to help stabilize the formulation on the bodyfacing surface on the topsheet and reduce migration and improve transfer to the skin (see column 15, lines 6-9). A suitable viscosity enhancer is polyethylene, talc or mixtures thereof (see column 15, lines 18 and 20; addresses claim 48). Active ingredients such as diaper rash skin protectants, which protect the injured or exposed skin or mucous membrane surface from harmful or annoying stimuli are included (see column 15, lines 31-36). Suitable active ingredients include calamine, dimethicone, cod liver oil, kaolin and its derivatives, lanolin and its derivatives, mineral oil, talc, zinc oxide and mixture thereof from about 0.10 to about 95 weight percent (see column 15, lines 40-44; addresses claims 39, 40, 47-50, 53 and 57). To further enhance the benefit to the wearer, antimicrobial, antifungal, antiseptic, colorants, and fragrances can be added (see column 15, lines 54, 55, 61, 62, and column 16 lines 6 and 7; addresses claim 57). The treatment composition is added to the topsheet by spraying (see column 23, lines 59 and 60).

Clark et al. teaches a composition for superior, longer-lasting barrier formulation as a protective barrier for incontinent patients along with managing diaper rash in humans (see column 4, lines 55-59). The inorganic barrier component zinc oxide is used and should be micronized to a particle size such that the barrier composition itself,

after the addition of the inorganic component, is a smooth homogeneous composition that is essentially grit free (see column 7, lines 5-9 and claim 20). Zinc oxide has a mild astringent, protective and antiseptic action. Thus it is often used in the treatment of skin disorders and a number of epidermal infections (see column 7, lines 11-14).

To one of ordinary skill in the art at the time of the invention would have found it obvious and motivated to combine the method of Heilig and calamine, dimethicone, cod liver oil, kaolin and its derivatives, lanolin and its derivatives, mineral oil, talc, zinc oxide and mixture thereof because Paul et al. teaches the following: (1) the above ingredients are diaper rash skin protectants, which protect the injured or exposed skin or mucous membrane surface from harmful or annoying stimuli (see column 15, lines 31-36); (2) the composition may be sprayed (see column 23, lines 59 and 60). Therefore, using a known diaper rash skin protectant would be beneficial in a method to treat diaper rash. Additionally, since the composition can be formulated into a spray, the above ingredients can be used in the method of Heilig.

To one of ordinary skill in the art at the time of the invention would have found it obvious and motivated to combine the method of Heilig and the average particle size of zinc oxide as disclosed in claims 40-43 and 60 because Clark et al. teaches that zinc oxide should be micronized to a particle size such that the barrier composition itself, after the addition of the inorganic component, is a smooth homogeneous composition that is essentially grit free (see column 7, lines 5-9 and claim 20). One skilled in the art

would be able to determine the optimal particle size of zinc oxide by routine experimentation.

To one of ordinary skill in the art at the time of the invention would have found it obvious and motivated to combine the method of Heilig and beeswax, C30 alkyl dimethicone, jojoba oil, microcrystalline wax, paraffin and mixtures thereof (see column 14, lines 44, 47, 49, 53-54, and 59) is because Paul et al. teaches the following: (1) the above ingredients modify the mode of transfer in that the lotion tends to fracture or flake off instead of actually rubbing off onto the skin of the wearer which can lead to improved transfer to the skin. Additionally, the ingredients further function as an emollient, occlusive agent, moisturizer, barrier enhancer and combinations thereof (see column 14, lines 31-43); (2) the composition may be sprayed (see column 23, lines 59 and 60). Therefore, using ingredients that benefit the wearer of a diaper with the above properties would be beneficial in a method to treat diaper rash. Additionally, since the composition can be formulated into a spray, the above ingredients can be used in the method of Heilig.

**(3) Claims 51 and 52 are rejected under 35 U.S.C. 103(a) as being unpatentable over Heilig (US 3,079,299) as applied to claims 39, 49, 57, 74, 76, and 88 above, in view of Steuart et al. (US 5,330,756).**

Heilig teachings are as applied to claims 39, 49, 57, 74, 76, and 88 above.

Heilig does not teach calendula extract, chamomile extract, comfrey extract, or a plant based oil.

Steuart et al. teaches a method of treating a variety of skin conditions, such as diaper rash (see column 6, lines 19 and 20) with a therapeutic formulation comprising concentrated fluid plant extracts such as *S. officinale* (see abstract, lines 4, 5, and 11-14; column 4, line 45; and column 5, lines 29-32), and olive oil, castor oil, and jojoba oil (i.e. plant based oils; see column 10, example B2 and B3). Alcohol or glycol extract solutions of *S. officinale*, which is called "comfrey" has been recognized for decades for its healing properties, particularly for its ability to stimulate epithelial development externally in the case of skin damage (see column 1, lines 21, 21, and 61-64). The formulations are formulated into a spray (see column 5, lines 50-53). In oil and water emulsion formulations, the oil is the dispersed phase for the purpose of protecting, moisturizing, and stimulating the healing processes of skin or mucous membrane (see column 5, lines 40-44).

To one of ordinary skill in the art at the time of the invention would have found it obvious and motivated to combine the method of Heilig and comfrey extract and a plant based oil because Steuart et al. teaches a method of treating diaper rash with and comfrey extract in a variety of plant based oils. The benefit of using comfrey extra in an

oil is because of the following teachings by Steuart et al.: (1) comfrey extracts have been recognized for decades for its healing properties, particularly for its ability to stimulate epithelial development externally in the case of skin damage (see column 1, lines 21, 21, and 61-64); and (2) the oil is the dispersed phase for the purpose of protecting, moisturizing, and stimulating the healing processes of skin or mucous membrane (see column 5, lines 40-44). Additionally, since the composition can be formulated into a spray, the above ingredients can be used in the method of Heilig.

**(4) Claims 74, 75, 87, 89, 93 and 94 are rejected under 35 U.S.C. 103(a) as being unpatentable over Heilig (US 3,079,299) as applied to claims 39, 49, 57, 74, 76, and 88 above, in view of Ando (US 5,881,925).**

Heilig teachings are as applied to claims 39, 49, 57, 74, 76, and 88 above.

Heilig does not teach a pump spray dispenser and a pressure release device (claims 74, 75 and 87). A piston-style dispenser, wherein pressure is maintained on the composition by pressure of the piston is also not taught (claim 89). Lastly, a manually actuated or reciprocating actuator spray delivery mechanism is not taught (claims 93 and 94).

Ando teaches a atomizer of the reciprocating pump type with a push button that is capable of being pressed with a finger, a piston which is pushed down by pressing

the push button, a pressure chamber formed with the cylinder and the piston that has an inlet leading to the inside of the container and an outlet leading to the internal passage in the push button, the outlet of the pressure chamber moves against the force increased when the piston is pressed by the push button to open the above outlet (see column 1, lines 46 and 52-64; addresses claims 74, 75, 87, 89 and 94). Conventionally, atomizers that spray a mixture of liquid and powder are available such that the user shakes the mixture well in the container and then the push button is pressed. The atomizing tube is pushed in and opens the valve and the mixture is atomized through the nozzle (see column 1, lines 13, 14, and 18-23; addresses claim 93). The reciprocating pump type device provides an atomizer that is capable of stirring a mixture sufficiently and atomizing both powder and a liquid when used (see column 1, lines 24-32).

To one of ordinary skill in the art at the time of the invention would have found it obvious and motivated to combine the method of Heilig and a reciprocating pump type device with a piston-style dispenser, wherein pressure is maintained on the composition by pressure of the piston because Ando teaches the following: (1) reciprocating pump type with a push button that is capable of being pressed with a finger, a piston which is pushed down by pressing the push button, a pressure chamber formed with the cylinder and the piston that has an inlet leading to the inside of the container and an outlet leading to the internal passage in the push button, the outlet of the pressure chamber moves against the force increased when the piston is pressed by the push button to

open the above outlet (see column 1, lines 46 and 52-64); and (2) the reciprocating pump type device provides an atomizer that is capable of stirring a mixture sufficiently and atomizing both powder and a liquid when used (see column 1, lines 24-32). Being that the applicant's method comprises a liquid and solid, this device would be suitable to deliver the diaper rash composition.

To one of ordinary skill in the art at the time of the invention would have found it obvious and motivated to combine the method of Heilig and a spray delivery comprising a manually actuated spray delivery mechanism is because as taught by Ando, it is the conventional way to atomize liquid and solid compositions (see column 1, lines 13, 14, and 18-23). Being that the applicant's method comprises a liquid and solid, this device would be suitable to deliver the diaper rash composition.

**(5) Claims 90 and 91 are rejected under 35 U.S.C. 103(a) as being unpatentable over Heilig (US 3,079,299) as applied to claims 39, 49, 57, 74, 76, and 88 above, in view of Davies et al. (US 5,169,037).**

Heilig teachings are as applied to claims 39, 49, 57, 74, 76, and 88 above.

Heilig does not teach a bag-in-can-style dispenser, wherein the pressurized compartment is a polymeric bag received inside a rigid can or wherein the pressure is

maintained upon the composition by a pressurizing gas received in the can and externally to the bag (claims 90 and 91).

Davies et al. teaches a product dispenser with a product bag. Pressure in the container surrounding the bag determines the dispensing pressure (see abstract, lines 1-4; addresses claims 90 and 91). The product bag is constructed of a suitable barrier material, which may take the form of a gas impervious material (see column 2, lines 6-8 and 31-33) and the height should be approximately equal to the different between the in inside can height (see column 7, line 51 and 52). The pressure regulating system is configured so as to permit product dispensing with an unrestricted orientation of the product dispenser while avoiding loss in product dispensing pressure or interruption of product dispensing (see column 2, lines 59-64). Additionally, the product has the following advantages: (1) the capability of choosing a starting pressure depending upon the amount of product fill in the product bag together with a given can size and product bag size; and (2) off the shelf actuators which are cheaper and less prone to clogging than special units designed for wide range of pressure in the dispensing of the product can be used (see column 14, lines 36-45).

To one of ordinary skill in the art at the time of the invention would have found it obvious and motivated to combine the method of Heilig and a bag-in-can-style dispenser, wherein the pressurized compartment is a polymeric bag received inside a rigid can or wherein the pressure is maintained upon the composition by a pressurizing



gas received in the can and externally to the bag because Davies et al. teaches the above bag-in-can style dispenser, which permits product dispensing with an unrestricted orientation of the product dispenser while avoiding loss in product dispensing pressure or interruption of product dispensing (see column 2, lines 59-64). Additionally, the product has the following advantages: (1) the capability of choosing a starting pressure depending upon the amount of product fill in the product bag together with a given can size and product bag size; and (2) off the shelf actuators which are cheaper and less prone to clogging than special units designed for wide range of pressure in the dispensing of the product can be used (see column 14, lines 36-45).

**(6) Claims 90 and 92 are rejected under 35 U.S.C. 103(a) as being unpatentable over Heilig (US 3,079,299) as applied to claims 39, 49, 57, 74, 76, and 88 above, in view of Hanson et al. (US 5,249,747).**

Heilig teachings are as applied to claims 39, 49, 57, 74, 76, and 88 above.

Heilig does not teach a bag-in-can-style dispenser, wherein the pressurized compartment is a polymeric bag received inside a rigid can. Also, an elastic shape-memory bag wherein the pressure is maintained upon the composition by maintaining the bag in an expanded state is not taught.

Hanson et al. teaches a dispensing system for viscous fluids having a viscosity of greater than 60 cps (see column 3, lines 44-48), particularly vegetable oil containing compositions in closed pressurized containers such as bladder packs (see column 2, lines 8-13).

To one of ordinary skill in the art at the time of the invention would have found it obvious and motivated to combine the method of Heilig and the specific bag-in-can-style dispenser, bladder pack container (Applicant refers to an elastic shape-memory bag wherein the pressure is maintained upon the composition by maintaining the bag in an expanded state as a bladder pack container on page 25, paragraph 1, lines 6-8) because Hanson et al. teaches a dispensing system for viscous vegetable oil containing compositions in closed pressurized containers such as bladder packs (see column 2, lines 8-13). Being that the applicant's method comprises a fluid base material with a viscosity from about 1 to 1000 cps (see specification page 12, paragraph 2, lines 1-4) that does not run off the skin (see claim 39) this device would be suitable to deliver the diaper rash composition.

### ***Response to Arguments***

Applicant's arguments filed November 2, 2007 have been fully considered but they are not persuasive.

35 U.S.C. 102(b) rejection

Applicant's arguments with respect to claims 39, 49, 57, 74, 76, and 88 have been considered but are moot in view of the new ground(s) of rejection.

Claims 40-53, and 60 rejected under 35 U.S.C. 103(a) as being unpatentable over Heilig (US 3,079,299) as applied to claims 39, 49, 57, 74, 76, and 88 above, in view of Paul et al. (US 6,217,890 B1), and in further view of Clark et al. (US 6,103,245);

Claims 51 and 52 are rejected under 35 U.S.C. 103(a) as being unpatentable over Heilig (US 3,079,299) as applied to claims 39, 49, 57, 74, 76, and 88 above, in view of Steuart et al. (US 5,330,756);

Claims 74, 75, 87, 89, 93 and 94 are rejected under 35 U.S.C. 103(a) as being unpatentable over Heilig (US 3,079,299) as applied to claims 39, 49, 57, 74, 76, and 88 above, in view of Ando (US 5,881,925);

Claims 90 and 91 are rejected under 35 U.S.C. 103(a) as being unpatentable over Heilig (US 3,079,299) as applied to claims 39, 49, 57, 74, 76, and 88 above, in view of Davies et al. (US 5,169,037); and

Claims 90 and 92 are rejected under 35 U.S.C. 103(a) as being unpatentable over Heilig (US 3,079,299) as applied to claims 39, 49, 57, 74, 76, and 88 above, in view of Hanson et al. (US 5,249,747).

The Applicant argues that the incorporation of ingredients from other references into the composition described in the Heilig patent would not alter that the Heilig delivery system is an aerosol delivery system. The Examiner appears to be suggesting that an aerosol dispenser and a non-aerosol dispenser would have been expected by a person skilled in the art to be interchangeable for delivering any composition having liquid and solid components. The Applicant's traverse this implication on the fact that although an aerosol and a non-aerosol delivery system have interchangeable mechanisms for delivery of compositions that are highly thinned, such a composition would run off of a surface on which it is sprayed. Additionally, one skilled in the art would not have had an expectation that he or she could successfully provide a composition as recited in the pending claims that would be sprayable using a non-aerosol spray delivery mechanism.

The Examiner disagrees for the reasons stated in the new 35 U.S.C. 103(a) rejection of Heilig in regards to Heilig rendering obviousness of an atomizing device other than an aerosol delivery system. Particularly, although the invention of Heilig focuses on the atomizing device being an aerosol, one skilled in the art is aware of other atomizing devices that provide the same effect of providing a fine spray or mist. Thus, the purpose of atomizing a diaper rash composition is taught by Heilig. Selection of a known material based on its suitability for its intended use is obvious absent a clear showing of unexpected results attributable to the Applicant's specific selection. See e.g., *In re Leshin*, 227 F.2d 197, 125 USPQ 416 (CCPA 1960). It is the normal desire of scientists or artisans to improve upon what is already generally known provides the motivation to adjust the amounts of components within the composition to obtain desired properties, such as the viscosity of the composition. Since there was no unexpected results presented that differ the atomizing device of an aerosol versus other atomizing devices, one skilled in the art would have found it obvious to use other already established atomized devices to provide the same effect of providing a fine spray or mist. In regards to the properties of the composition upon being sprayed, Heilig teaches a viscous composition that will not run-off of the treated area upon being atomized. Additionally, the combined teachings of Heilig, Paul et al., Clark et al. and Steuart et al. teach all the components of the Applicant's method and composition. Where the claimed and prior art products are identical or substantially identical in structure or composition, or are produced by identical or substantially identical processes, a prima facie case of either anticipation or obviousness has been

established. Thus, the claiming of a new use, new function or unknown property which is inherently present in the prior art does not necessarily make the claim patentable. In re Best, 562 F.2d 1252, 1254, 195 USPQ 430, 433 (CCPA 1977).

### ***Conclusion***

No claims are allowed. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Kendra D. Carter whose telephone number is (571) 272-9034. The examiner can normally be reached on 8:30 am - 5:00 pm.

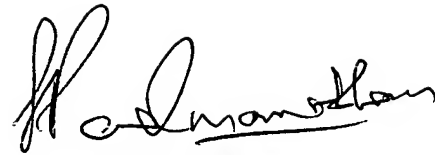
If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Sreeni Padmanabhan can be reached on (571) 272-0629. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

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KDC

A handwritten signature in black ink, appearing to read "Sreeni Padmanabhan", with a horizontal line underneath the name.

SREENI PADMANABHAN  
SUPERVISORY PATENT EXAMINER